 VIII. Regionalisation, Federalisation, or Union with Confirmation of Territorial Unity

Recent practice has offered a number of solutions going beyond autonomy. These range from loose confederations or state unions to full or asymmetrical federal solutions. It should be noted that some of these, however, have been subjected to possible dissolution through self-determination clauses. This includes the very complex structure of Sudan in the wake of its three settlements (South, East and projected settlement for the West) permitting the South to leave after six years; Bougainville, which enjoys an asymmetrical federal status for at least 10 years; the abortive 1996–1967 settlement of Chechnya; and the now defunct State Union of Serbia and Montenegro. These will be addressed separately below.

While autonomy already raises governments’ concerns, federal-type solutions are even more difficult to achieve nowadays. As was noted above, autonomy is often traded for an express renunciation of self-determination and a confirmation of the permanent territorial unity of the state. Where a more elevated status, such as that of a federal republic or constituent unit of a confederation or state union is concerned, the stability of such an arrangement is even more difficult to assure.\(^{140}\) In fact, the recent recognition of the doctrine of constitutional self-determination has made this more complicated. The Badinter Commission attached to the EU peace process for the former Yugoslavia had found that:\(^{141}\)

\(^{140}\) This problem was already addressed through the doctrine of perpetuity in the Articles of Confederation, 8 August 1778, Art. XIII: “[e]very State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State”. Full text available http://www.loc.gov/rr/program/bib/ourdocs/articles.html, accessed 3 November 2008

\(^{141}\) Badinter Opinion No. 1, 31 ILM (1992), 1494, para. 1(d).
Escaping the Self-determination Trap

In the case of a federal-type state, which embraces communities that possess a degree of autonomy and, moreover, participate in the exercise of political power within the framework of institutions common to the Federation, the existence of the state implies that the federal organs represent the components of the Federation and wield effective power.]

The Commission concluded that in the case of the Socialist Federal Republic of Yugoslavia the central institutions no longer functioned in the wake of the attempted secessions of Croatia and Slovenia. Hence, the state was found to be “in the process of dissolution”.142 The Canadian Supreme Court Reference concerning Quebec also appeared to suggest that a federal unit might be entitled to secede after having completed or exhausted negotiations with the central state. As the Court found:143

The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others.

Of course, this expansive reading of a right to constitutional self-determination may not be firmly established in international law as yet – general practice still appears to require an express confirmation of a right to secession in the constitution in order to generate a definite international legal entitlement to independence. Nevertheless, such pronouncements are prone to confirming the suspicion of governments contemplating a settlement that federalisation is the first step towards a legally privileged secession. Moreover, settlements such as those of Southern Sudan or Bougainville, which actually provide for loose federation as an interim step towards a referendum on independence, are bound to

143 Reference Re Secession of Quebec, supra n. 17, para. 151.